OCTOBER TERM 1960

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

HARRY HAROLD CHERETON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Harry Harold Chereton prays for issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit for the purpose of reviewing a decision of that Court affirming on January 30, 1961, the verdict of conviction of petitioner on May 5, 1959, and sentence thereon on May 19, 1959, in the United States District Court for the Eastern District of Michigan, Southern Division, and petition for re-hearing denied by the Court of Appeals on March 2, 1961.

Opinion Below

The opinion of the Court of Appeals for the Sixth Circuit has not yet been reported. The District Court rendered no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on March 2, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

(1) Is an indictment in the exact words of a valid criminal statute insufficient because it does not contain an element of the offense engrafted thereon by judicial decision?

(2) In a trial upon an indictment charging false statements in a bankruptcy proceeding, where the indictment does not allege the materiality of a particular statement, is it sufficient if the evidence discloses, in the opinion of the trial judge, ruling on objection, that proof tendered would be material to any bankruptcy proceeding inquiry?

(3) Were the comments of the trial judge, in the presence of the jury, made after ruling out repeated attempts to inject hearsay testimony as to the worthlessness of accounts receivable, of "What more has to be said", and "What additional testimony do you want above and beyond the fact that this man testified that he collected nothing from these accounts receivable, and his testimony that the people he designated to do the collecting and working on these accounts were honest people", an invasion of the province of the jury to be the sole judges of the evidence and of the witnesses, which was prejudicial to the petitioner where none of the persons designated to collect were produced as witnesses?

Statute Involved

Section 152, Chapter 9, Bankruptcy, 18 U.S.C. provides:

"* * * Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding * * * shall be fined * * * "

Concise Statement of the Case

Petitioner was indicted January 6, 1956, in an indictment containing five counts, the first count alleging conspiracy to violate the mail fraud statute, which count was dismissed, and each of Counts II, III, IV, and V alleging violations of Section 152 of Title 18, U.S.C., in the same form in the words of the statute. For example, Count II alleges that Chereton

"did knowingly and fraudulently make a false oath in relation to the bankruptcy proceeding in the matter of Consolidated Radio & Appliance Company, to-wit:

"'Question: What was the background leading up to this sale of accounts by your company to the bankrupt?

Answer: The only way I can answer that is this: Kauffman knew our business, he knew we were creating a large volume of sales through the direct installment sales business and he has been trying to get into this kind of business for I would say many years; in fact, back three or four or five years ago he wanted to learn this business and he even went to work for one of our branches for a period of three or four months to get some background information of this business. It was back four or five years ago—I am unfamiliar with the date—and he was always asking me for information how to get in this

> business. It is hard to start your business; the only way you can do is by starting from—making a running start. And we met on numerous occasions, I would say dozens and dozens of times, and he would talk to me, I would talk to him, and out of these conversations the idea was developed that he would buy these receivables.' "

Count III alleged a false statement in exactly the same words of the statute, followed by questions and answers set out in Count III.

Counts IV and V were in similar form. None of these counts alleged that the statements alleged to have been made therein were material to any inquiry pending in any bankruptcy proceeding pertaining to Consolidated Radio & Appliance Company. Petitioner challenged this insufficiency of the indictment, and was overruled on this point. (App. 51a)

During the trial defense counsel objected to the materiality of certain proofs offered by the Government through witnesses on the stand. These objections were overruled without defining the materiality of the proffered evidence.

On review in the Court of Appeals, these rulings were upheld (Op. 5).

As to the insufficiency of the indictment, the Court of Appeals said (Op. 5):

> "We would hesitate to hold that an indictment in the exact words of a valid criminal statute was insufficient because it did not contain an element of the offense engrafted thereon by judicial decision."

As to the ruling with respect to the materiality of proffered evidence, and the validity of objection thereto on trial, the Court of Appeals said (Op. 5):

> "In such a case as the present one, it would be sufficient if the evidence disclosed that the question propounded related to a material matter."

The evidence mentioned by the Court of Appeals must necessarily refer to the evidence in the record of the trial up to that point at which the trial court made its ruling. While the indictment does not so allege, the tenor of the Government's theory and its proofs to that point implied that there was a sale of worthless accounts receivable.

At no time before submitting the case to the jury was the issue of materiality defined with sufficient clarity for the jury.

Objection was made to the Government's attempt to prove, through the testimony of the bankrupt's receiver, of "efforts" allegedly made by his employees to collect upon the accounts receivable, without confronting accused with such persons. This the Court sustained, but immediately injected the same testimony by the comments aforequoted, to the effect that since nothing was collected, the accounts were, in the Court's opinion, valueless.

These remarks the Court declined to strike, and covered only in his charge to the jury, in effect, to ignore comments made during the trial, as they were the sole judges of the facts. Of this, the Court of Appeals said:

> "The comment made by the Court must be considered in its context with respect to other questions propounded at the time. The witness was being examined by Government counsel when the Court asked the questions. The Government claims that the comment was directed to it.
>
> "We find no error in the questions asked by the Court or in his comment affecting the substantial rights of

Chereton. Rule 52(a) Federal Rules of Criminal Procedure.

"Furthermore, the Court's instructions to the jury cured any claimed erroneous impression that the comment might otherwise have made on the jury." (C.A. Op. 7)

In this conclusion, the Court of Appeals is in conflict with other courts of appeal.

Petitioner was convicted and sentenced on each of Counts II, III, IV, and V of the indictment.

Jurisdiction of the District Court

The jurisdiction of the District Court for the Eastern District of Michigan, Southern Division, is to be found in Section 1334, Bankruptcy Matters & Proceedings, Title 28, U.S.C., as follows:

"The district courts shall have original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy."

Section 3231, Chapter 211, Jurisdiction & Venue, Title 18 U.S.C., provides:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the states of all offenses against the laws of the United States."

Reasons For Granting the Writ

The questions here raised have never been settled by this Court.

Only decisions of the United States Courts of Appeals

were available to, cited in, and relied upon by the Court for the Sixth Circuit. These decisions conflict with each other with respect to the questions involved.

Rudin vs. *United States*, 254 Fed. 2(d) 45 (C.A. 6, 1958), cited by appellant Chereton and the Court of Appeals in its opinion, holds that an indictment must allege all of the elements necessary to constitute a violation of the statute. This is accepted as the law of the case in the Sixth Circuit.

Meer vs. *United States*, 235 Fed. 2(d) 65 (C.A. 10, 1956), cited by appellant Chereton and the Court of Appeals in its opinion, holds that materiality is an essential element of an offense charged under Title 18 U.S.C., Section 152. The Court of Appeals for the Sixth Circuit, in its opinion, further states that the Meer case, supra, also decided that it was necessary for the indictment either to expressly allege that the false statement was material, or to set forth sufficient facts to show the materiality.

United States vs. *Margolis*, 138 Fed. 2(d) 1002 (C.A. 3, 1943), cited by appellant Chereton and the Court of Appeals in its opinion, holds:

"The false oath must relate to a material matter." The sufficiency of the indictment in the Margolis case was not in question.

An example of one possible relationship of materiality which is not alleged in the indictment claimed by the Government on trial, defined by the trial court to the jury, or otherwise set forth in the entire record, is that the inquiry in bankruptcy was conducted pursuant to an order for the purpose of administering the estate of the bankrupt. In the light of the lack of definition referred to, how could a jury be guided properly under the law in reaching a verdict

as to the materiality of the question set forth in Count II of the indictment:

> "What was the background leading up to this sale of accounts by your company to the bankrupt?"

This example is intended only to illustrate that there was in effect no requirement of materiality, and that this same kind of lack of materiality affected the allegations in each count, and the evidence submitted by the Government.

Notwithstanding the rule that materiality is an essential element of the offense, and that it must be alleged in the indictment, and proved with particularity, the decision, the review of which is herein petitioned, does not require compliance with this rule.

In holding that the trial court's comments did not destroy appellant's right to be confronted with the witnesses against him, and were not an invasion of the province of the jury, and that they were cured by the trial court's instruction to the jury, the Court of Appeals for the Sixth Circuit is holding in conflict with other cases decided by courts of appeal, which were cited by appellant to that Court.

See *Crowe* vs. *Di Manno*, 225 Fed. 2(d) 652-5 (C.A. 1); *United States* vs. *Bloom*, 237 Fed. 2(d) 158 (C.A. 2); *United States* vs. *Barnett*, 196 Fed. 2(d) 653-5 (C.A. 2); *Patrick* vs. *Rice*, 98 Fed. 2(d) 550-1 (C.A. 3); *R. L. Mack, et al.*, vs. *United States*, 268 Fed. 2(d) 931-3 (C.A. 5); *Krogmann* vs. *United States*, 225 Fed. 2(d) 220-9 (C.A. 6); *United States* vs. *Garengella*, 198 Fed. 2(d) 3-8 (C.A. 7); *Williams* vs. *United States*, 93 Fed. 2(d) 685-9 (C.A. 9); *Bellici* vs. *United States*, 184 Fed. 394 (C.A., D.C.); *Blunt* vs. *United States*, 244 Fed. 2(d) 355-65 (C.A., D.C.).

This Court has not passed upon the questions involved in the conflicts among the appellate courts.

Conclusion

In view of the importance of the questions involved, and the fact that the statute has not been construed by this Court in this connection, and that there is conflict between the decisions of the Courts of Appeals of the various circuits on the questions raised, it is respectfully requested that this petition be granted, and that a writ of certiorari issue as prayed.

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UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

No. 14172

HARRY HAROLD CHERETON, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*

January 30, 1961

as reported in 286 Fed. 2(d) 409-14

OPINION

Before McALLISTER, Chief Judge, and MARTIN and WEICK, Circuit Judges.

WEICK, Circuit Judge.

The grand jury returned an indictment against appellant Chereton containing five counts. The first count charged him with a conspiracy with one Raymond Kaufman to use the mails to defraud in violation of Title 18 U. S. C. Par. 1341. The remaining four counts of the indictment charged Chereton with knowingly and fraudulently making false oaths in relation to the bankruptcy proceeding, In the Matter of Consolidated Radio and Appliance Company, in violation of Title 18 U. S. C. Par. 152.[1]

The case was tried before a jury in the District Court and at the conclusion of the Government's case, the Court dismissed count one of the indictment which charged the conspiracy to use the mails to defraud. The case was submitted to the jury on the remaining four counts charging the false oaths in the bankruptcy proceeding resulting in Chereton's conviction on all of said counts. He was sentenced to two years imprisonment on each of the four counts to be served concurrently.

In the District Court, Chereton had moved to dismiss the remaining four counts of the indictment on the ground that

[1] "Whoever knowingly and fraudulently makes a false oath • • • in or in relation to any bankruptcy proceeding; • • •"

they did not specifically charge that the alleged false oaths were material to the inquiry in the bankruptcy proceeding. The District Judge denied the motion to dismiss and Chereton claims that this was prejudicial error.

Count two of the indictment is contained in footnote.[2] Counts three, four and five in the same manner quoted the questions propounded and the answers alleged to be false.

The questions propounded to Chereton, set forth in the several counts of the indictment, in substance elicited information relative to the sale of accounts receivable made by Mid-States Equipment Company, a corporation, to the bankrupt, Consolidated Radio and Appliance Company, to sales of merchandise by Consolidated to Mid-States and to the checks issued by Consolidated purportedly in payment for the merchandise, but which were endorsed by Consolidated and returned to Mid-States.

Chereton controlled Mid-States and his cousin Raymond Kaufman was in control of Consolidated.

---

[2] "Count Two:

"The grand jury further charges:

"That on or about February 25, 1953, in the Eastern District of Michigan, Southern Division, Harry Harold Chereton, alias Harry H. Chereton, did knowingly and fraudulently make a false oath in relation to the bankruptcy proceeding in relation to the bankruptcy proceeding in the matter of Consolidated Radio and Appliance Company, to-wit:

"Question: What was the background leading up to this sale of accounts by your company to the bankrupt?

"Answer: The only way I can answer that is this: Kaufman knew our business, he knew we were creating a large volume of sales through the direct installment sales business and he has been trying to get into this kind of business for I would say many years; in fact, back three or four or five years ago he wanted to learn this business and he even went to work for one of our branches for a period of three or four months to get some background information of this business. It was back four or five years ago—I am unfamiliar with the date—and he was always asking me for information how to get in this business. It is hard to start your business; the only way you can do is by starting from—making a running start. And we met on numerous occasions, I would say dozens and dozens of times, and he would talk to me, I would talk to him, and out of these conversations the idea was developed that he would buy these receivables."

"In violation of Section 152, Title 18 U.S.C."

At the trial, Kaufman testified that he was advised by Chereton to incorporate his business as part of a scheme engineered by Chereton to defraud creditors. Pursuant to this plan Mid-States sold $63,469.09 of accounts receivable, claimed to be worthless, to Consolidated for $47,601.82 for which Consolidated gave Mid-States an unsecured promissory note payable on demand. A written agreement was entered into providing for the sale of the accounts receivable. A financial statement of Consolidated was prepared and included the accounts receivable as an asset in the full amount. The agreement, note and financial statement all bear the same date, namely, May 15, 1952. Kaufman testified that Chereton told him that the accounts receivable were worthless. A portion of Kaufman's testimony is in footnote.[3]

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[3] "(56) Q. (By Mr. Owen, continuing): Mr. Kaufman, will you please tell the Court and jury, in your own words, in simple language, what was the nature of this scheme and how you were going to effect it, and how you were going to profit from it, and how (57) you were going to conceal your operation, how you were going to avoid detection, if you can? A. It started out first by incorporating the business. He advised me to incorporate; that I wouldn't be personally liable. Then he proceeded to have a note drawn and made out to the corporation.

"Q. Is this the note which you identified as Exhibit No. 8. A. That is correct.

"Q. Go on. A. And a contract for the sale of the accounts receivable. Then he advised me as to how to make up a statement with these accounts receivable, and how to show an inflated net worth.

"From there, he advised me on what type of merchandise to buy, because he needed a certain type of merchandise in his operation, that I was to send him.

"He sent a man along with me on several buying trips to advise me as to what type of merchandise to buy, and who to buy it from, and in what amounts to purchase that I would be able to obtain from these people.

"First he would advise me to buy a small amount and to receive the merchandise and then to pay promptly, and then the second time is to always enlarge or double the order, which the creditors wouldn't pay any attention to, in order to keep them from wanting their money, so to speak—in other words, to keep them off our backs, so to speak.

"(58) Did you find these suggestions and this advice effective? A. Yes, I did.

"Q. Did it work? A. Yes, it did.

"Q. Tell the Court and jury why Mr. Chereton went to such great pains and details to acquaint you with an operation of a business with which

Kaufman testified that of the merchandise thus obtained from creditors $56,754.22 in value was shipped to Mid-States and that Chereton paid him personally only $1,000.

Checks of Mid-States payable to Consolidated in the amounts of $18,534.28, $14,479.15 and $9,388.48 in payment for part of the merchandise were endorsed by Consolidated and returned to Mid-States and deposited in the bank account of Mid-States on which the checks had been drawn. Not all of the checks had been signed when they were endorsed. There were not sufficient funds in this bank account to pay any of the checks. The checks were credited as payments on this demand promissory note given in connection with the sale of the alleged worthless accounts receivable.

Kaufman further testified that Mid-States shipped Consolidated about $15,000 or $16,000 of merchandise, which had not been ordered and was practically worthless, in order to build up the amount that was owing from Consolidated to Mid-States.

Chereton cites Rudin v. United States, 6 Cir., 1958, 254 F. 2d 45, 48 which holds that an indictment must allege

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you were unfamiliar? A. Primarily, we had no idea of ever running the Consolidated Radio and Appliance as a business of this type. It was strictly an idea to obtain merchandise to be transferred to the Mid-States Equipment Company, where he would dispose of it through his company and return fifty cents on the dollar to me personally, and eventually let the Consolidated go into bankruptcy and wipe the whole thing out.

"Q. This was a scheme to steal, wasn't it? A. That is correct. To defraud the creditors.

"Q. You knew that was what it was when you entered into it? A. That is correct.

"Q. And you say Mr. Chereton knew of this, too? A. He advised me as to every detail.

"Q. Whose idea was it. A. Mr. Chereton's.

"Q. How did Mr. Chereton profit from this scheme? A. The merchandise was shipped to his company. He——

"Q. (Interposing): Merchandise was shipped to his company from (59) whom? A. From Consolidated.

"Q. That was your company? A. That is correct. And he disposed of the merchandise. He gave me the offices and places to ship the merchandise. He had offices throughout the country—various parts of the county—and I would ship the merchandise at his direction in what amounts he wanted to each of his offices."

all of the elements necessary to constitute a violation of the statute. In that case we held it was not necessary that the indictment follow the exact wording of the statute. Judge Miller, who wrote the opinion of this Court said that "the test of the sufficiency of an indictment is that it must sufficiently apprise the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, that the record show with accuracy to what extent he may plead a former acquittal or conviction." To the same effect is Anderson et al. v. United States, 6 Cir., 1954, 215 F. 2d 84, 86.

Chereton relies on Meer v. United States, 10 Cir., 1956, 235 F. 2d 65 and United States v. Margolis, 3 Cir., 1943, 138 F. 2d 1002.

In Meer, the Court held that materiality was an essential element of an offense charged under Title 18 U. S. C. Par. 152 although not made so by the statute. The reasoning adopted by the Court was that Congress did not intend to make a false statement in a bankruptcy proceeding an offense where not material to the inquiry or issue presented. In a perjury case, the statute expressly requires that the statement relate to a material matter. Title 18 U. S. C. 1621. The Court further held that it was necessary for the indictment to either expressly allege that the false statement was material or to set forth sufficient facts to show the materiality.

We would hesitate to hold that an indictment in the exact words of a valid criminal statute was insufficient because it did not contain an element of the offense engrafted thereon by judicial decision. In such a case as the present one, it should be sufficient if the evidence disclosed that the question propounded related to a material matter. To us the point seems highly technical because even though materiality was not expressly alleged in the indictment, it clearly appeared from the questions and answers set forth therein that they were material to the inquiry in the bankruptcy proceeding. This is all that the decision in Meer required.

Margolis is authority for the proposition that the false oath must relate to a material matter. It did not involve any question concerning the sufficiency of the indictment.

Chereton states in his brief (p. 17)—

> "No proofs were offered as to the nature of the inquiry then being conducted. Thus, there was nothing before the lower court upon which his ruling could be predicated, that the questions and answers were legally pertinent to the inquiry being conducted."

In this, Chereton is in error. The record (Government's Exhibit No. 25) clearly shows that he was being examined in the bankruptcy court in a proceeding under Section 21, sub. a of the Bankruptcy Act, 11 U.S.C.A. Par. 44 sub. a. This section authorized the bankruptcy court to require any designated person to appear before the court "to be examined concerning the acts, conduct, or property of the bankrupt."

(1-3) Examination of a designated person under this section may be as broad in scope as that permitted of the bankrupt himself. *Ulmer* v. *United States*, 6 Cir., 1915, 219 F. 641. The examination is in the nature of a discovery proceeding. It provides the means for a thorough investigation into the affairs of the bankrupt calculated to lead to the discovery and recovery of his assets and a determination of the amount of his indebtedness. The relevancy of questions propounded is not to be determined by standards applied to the trial of issues, but by the broader test of relevancy applied under Rule 26 of the Federal Rules of Civil Procedure, 28 U.S.C. *Matter of Autocue Sales & Distributing Corp.*, D.C.N.Y. 1957, 151 F. Supp. 798. The "* * * trustee may inquire at large and without limit except in cases of plain abuse, to be determined in the Court's discretion." *Marx* v. *Chase National Bank*, 2 Cir., 1941, 117 F. 2d 800, 801. The inquiry may even be a fishing expedition. *In re Foerst*, 93 F. 190 (D.C.S.D. N.Y. 1899). It is no objection that it leads to the prosecution of an action against the witness. *Marx* v. *Chase National Bank*, *supra*. In proceedings for the reorganization of a corporation under the Bankruptcy Act (11 U.S.C.A. Par. 501 et seq.) the examination before a master appointed by the Court may be "exploratory and groping; and it may be as searching as to him appears

proper." *Sachs* v. *Hadden*, 2 Cir., 1949, 173 F. 2d 929, 931.

(4) These questions set forth in the several counts of the indictment sought to examine Chereton "concerning the acts, conduct, or property of the bankrupt." 11 U. S. C. A. Par 44, sub. a. Sufficient facts appear in the questions and answers to establish that they were clearly material to the inquiry. The Trial Judge was right in determining their materiality as a matter of law at the trial. *Ulmer* v. *United States, supra; United States* v. *Parker*, 7 Cir., 1957, 244 F. 2d 943, *certiorari denied* 355 U. S. 836, 78 S. Ct. 61, 2 L. Ed. 2d 48. In our judgment, the indictment sufficiently apprised Chereton of what he must be prepared to meet. He could not be brought to trial again for having given the false answers to the questions set forth at length in the indictment. *Rudin* v. *United States, supra.*

(5) The remaining point to be considered is Chereton's claim that the District Judge assumed the examination of a principal witness and after a question had been answered inquired "What more needs to be said?" Chereton claims that this was prejudicial error.

The witness Davis was a Government witness. He was the receiver and trustee in bankruptcy of Consolidated. He testified on direct examination as to the efforts made to collect the accounts receivable purchased by Consolidated from Mid-States and the fact that nothing was collected on any of these accounts. Davis had personally sampled about 50 of the accounts and could not find any of the debtors. Some of the addresses were fictitious. Three members of Davis' own staff and two outside individuals attempted to make collections on the accounts without success. He then referred the account to a Collection Agency on a 50% contingent basis and no collections were made by the agency. The bankrupt had not made any collections on these accounts subsequent to their purchase.

The District Judge did ask questions of the witness Davis, but, in so doing, we do not believe that he assumed to take over the examination of the witness. The District Judge had a right to ask the questions. His role was more important than that of a mere umpire. *Glasser* v. *United*

States, 1942, 315 U. S. 60, 82, 62 S. Ct. 457, 86 L. Ed. 680; *United States* v. *Curcio*, 2 Cir., 1960, 279 F. 2d 681.

The comment made by the Court must be considered in its context with respect to the other questions propounded at the time. The witness was being examined by Government counsel when the Court asked the questions. The Government claims that the comment was directed to it.

We find no error in the questions asked by the Court or in his comment affecting the substantial rights of Chereton. Rule 52(a), Federal Rules of Criminal Procedure, 18 U. S. C.

Furthermore, the Court's instructions to the jury cured any claimed erroneous impression that the comment might otherwise have been made on the jury.[4]

There is no claim that the Court's instructions to the jury were erroneous in any respect. A number of the propositions of law covered in the instructions were given by the Court as requested by counsel for Chereton. The verdict is supported by substantial evidence.

The judgment of the District Court is affirmed.

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[4] "You, as members of this jury, are the exclusive judges of the facts.

"The Court expresses no opinion on the facts of the case, or as to the evidence, nor do I wish you to understand or conclude from anything that I may have said during this trial, or in the course of these instructions at any time that I have intended, either directly or indirectly, to indicate any opinion on my part as to the facts, or as to what I think your findings should be.

"From time to time during the course of the trial the Court asked questions of the witnesses and made comments as to the law in ruling upon objections and motion made by counsel for both sides. You are not to infer from the questions asked by the Court, or such comments that I may have made, that the Court was thereby indicating any opinion as to the evidence or as to what your findings should be. Those questions were asked, and the comments made, in the exercise of the Court's inherent power and its duty to supervise the trial of this particular cause."

Filed March 2, 1961. Carl W. Reuss, Clerk

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14,172

HARRY HAROLD CHERETON, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*

ORDER

Before: MARTIN, McALLISTER and WEICK, Circuit Judges.
Upon Consideration,

IT IS ORDERED That the Petition for Rehearing in the above case be and it hereby is denied.

Approved for entry:

(Signed) PAUL C. WEICK,
United States Circuit Judge.

(5766-1)

LE COPY

FILED
APR 28 1961
JAMES R. BROWNING, Clerk

No. 871

In the Supreme Court of the United States

OCTOBER TERM, 1960

HARRY HAROLD CHERETON, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 871

HARRY HAROLD CHERETON, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 286 F. 2d 409.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1961 (Pet. App. 1). A petition for a rehearing was denied on March 2, 1961 (Pet. App. 9). The petition for a writ of certiorari was filed on April 4, 1961.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Even though the petition was received by the Clerk on March 31, 1961, it was not filed until April 4, 1961, when the record was received. Accordingly, the petition is out of time, having been filed two days after expiration of the 30-day period for filing.

QUESTIONS PRESENTED

1. Whether an indictment charging the making of false oaths in a bankruptcy proceeding was sufficient, where it did not expressly allege that the false answers were material to the proceeding but did allege facts showing such materiality.

2. Whether the trial court's comments at one point in the trial were improper.

STATUTES INVOLVED

18 U.S.C. 152 provides in pertinent part:

* * *

> Whoever knowingly and fraudulently makes a false oath * * * in relation to any bankruptcy proceeding; * * *
>
> * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a), provides in pertinent part:

> (a) The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court * * * to be examined concerning the acts, conduct, or property of a bankrupt; * * *

STATEMENT

Count 1 of an indictment returned in the United States District Court for the Eastern District of Michigan charged the petitioner and co-conspirator Kaufman with using the mails to defraud, in violation of 18 U.S.C. 1341. The scheme alleged was that petitioner and Kaufman would prepare a false financial

statement for Consolidated Radio and Appliance Company (Kaufman's corporation), showing that on May 15, 1952, petitioner sold to it, from Midstate Equipment Company (petitioner's corporation), $63,469.09 in accounts receivable in return for a note executed by Kaufman for $47,601.82, representing 75% of the purported value of the accounts receivable; that, in truth, these accounts were of little or no value; and that the false financial statement was to be used to defraud prospective creditors of Consolidated by obtaining property from them (App. 2a-4a).

Counts 2 through 5, inclusive, charged the petitioner with knowingly and fraudulently making false oaths on February 25, 1953, while being questioned in the Consolidated bankruptcy proceeding, in violation of 18 U.S.C. 152. The questions and answers set out in these counts involved the background leading to the sale of the accounts receivable by Midstate to the bankrupt Consolidated; petitioner's testimony that all of the accounts were from the metropolitan Detroit area; and his explanation as to why, when he was making demand upon Consolidated for payment on the note, he issued a Midstate check to Consolidated to cover the purchase price of certain merchandise and had Consolidated endorse the check back to him (App. 4a-5d).

At the close of the government's case, the court ruled that the indictment in counts 2 through 5, inclusive, sufficiently alleged facts showing that the false oaths were material to the proceeding in the bankruptcy court (App. 47b-49b), but granted a motion to dismiss count 1 relating to the conspiracy (App. 50a). The jury found petitioner guilty on counts 2 through 5, inclusive, and the court imposed concurrent sentences for

two years' imprisonment on each of these counts (App. 1a). On appeal (App. 1a), the conviction was affirmed (Pet. App. 1-8).

Pertinent evidence adduced at the trial may be summarized as follows:

1. Co-conspirator Kaufman[2] was the owner of Consolidated (App. 15a). Petitioner was the controlling owner of Midstate (App. 13b).

Kaufman testified that petitioner advised him to incorporate Consolidated, purchase accounts receivable from Midstate to get an inflated credit statement, purchase merchandise on the basis of this statement, transfer the merchandise to Midstate, and receive 50 cents on the dollar while permitting Consolidated to go bankrupt. Kaufman stated that both he and petitioner knew, at the time they entered into it, that this was a scheme to steal and defraud creditors (App. 4b, 5b, 15a). Pursuant to this plan, on May 15, 1952, Midstate sold $63,469.09 of accounts receivable[3] for $47,601.82, for which Consolidated gave Midstate a promissory demand note. Consolidated's financial statement listed the accounts receivable as assets (App. 16a-17a, 4b, 19b). Kaufman testified that petitioner told him that the accounts were delinquent and not collectible (App. 17a).[4]

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[2] Kaufman, after Consolidated's bankruptcy, pled guilty to mailing an incorrect Consolidated financial statement and was sentenced to imprisonment for 18 months (App. 10b-11b).

[3] Of the accounts receivable cards purchased, an F.B.I. agent testified that 437 of them, representing $11,818.17, came from outside the metropolitan Detroit area (App. 45a). This was contrary to petitioner's testimony set out in count 3 (App. 5b).

[4] Petitioner testified at the trial that to the best of his knowledge none of the Midstate accounts was uncollectible (App. 56a), and that he did not agree to pay Kaufman 50 cents on the dollar for merchandise shipped by Consolidated to Midstate (App. 59a).

The total amount of merchandise obtained from creditors by Consolidated and shipped to Midstate was $56,754.22 (App. 7b). In purported payment for such shipments, Midstate would issue its check, usually unsigned, to Consolidated; Kaufman would endorse it on behalf of Consolidated and return it to Midstate with the amount to be credited on the note owing by Consolidated for purchase of the accounts receivable (App. 18a-19a, 7b-8b). For example, one Midstate check for $14,479.15 (Gov. Ex. 9) was issued at a time when its bank balance was only $58.15 and deposited after endorsement by Consolidated, the net effect being a deposit of the same amount withdrawn (App. 7b-8b; App. 28a-30a; and see App. 47a-48a).

There was also evidence that, in furtherance of the scheme to defraud, Midstate shipped to Consolidated worthless merchandise in order to "build up the amount" owed to Midstate (App. 9b, 15b-16b).

2. Government witness Davis, the trustee for the bankrupt Consolidated, testified that he and his staff made a thorough investigation of the accounts receivable and that they were not collectible (App. 7a, 8a). This colloquy occurred during Davis' testimony (App. 10a):

> THE COURT: (Interposing) How much money was turned in to you as trustee of this bankruptcy estate as a result of the efforts of the people that you designated to work these account slips, as a result of their work?
>
> A. None.
>
> THE COURT: What more has to be said?
>
> Are you satisfied, from your position as trustee of the bankrupt corporation, that an effort was made to honestly try and collect these accounts?

> MR. WALKER [defense counsel]: I would like to object to that, your Honor. I think that is calling for a conclusion. It is calling for a relation of events that somebody else participated in, and this man's knowledge of it would be purely hearsay.

The court overruled the objection, and the witness answered, "Very definitely" (App. 10a).

Later, the prosecutor offered to introduce into evidence the bankruptcy court file. Defense counsel objected that this would be hearsay (App. 12a, 13a). The court then inquired (App. 3b):

> What additional testimony do you want above and beyond the fact that this man testified that he collected nothing from these accounts receivable and his testimony that the people he designated to do the collecting and working on these account records were honest people?

The prosecutor answered that the nature of these accounts would be explained to the jury. The court stated that the accounts were in evidence, that the prosecutor could explain any one of them, and suggested that, if the prosecutor wanted to offer testimony as to experiences of the collectors, he should bring them in (App. 3b).

After defense counsel stated he had no questions for cross-examination, the prosecutor recalled the trustee to the stand and this testimony was given (App. 3b-4b):

> Q. (By Mr. Owen, continuing): Mr. Davis, as trustee of this bankrupt estate, did you yourself attempt to ascertain the collectibility of these accounts receivable?
>
> A. Yes, I did, I sampled probably—
>
> Q. (Interposing): You did?

A. I sampled approximately 50 of them myself. Found that I was making no progress. Couldn't locate the individuals. In many instances, fictitious addresses. And, as a result of it, I then turned it over to my own collection department to work on. They found them to be—

MR. WALKER (interposing): Now, just a minute as to what your collection department found. That is hearsay, your Honor; a conclusion.

THE COURT: He can't testify to what they found.

Q. (By Mr. Owen, continuing): Did the collection agency, to which you referred these accounts, collect them?

A. No, sir, they didn't.

ARGUMENT

1. In upholding the sufficiency of the indictment, both the district court and the court of appeals agreed with decisions in other circuits that, in order to be punishable under 18 U.S.C. 152, the false oath has to be material to the bankruptcy proceeding,[5] but held that materiality sufficiently appeared from the facts alleged in the indictment. This ruling was correct and presents no conflict with any other circuit. The questions set forth in counts 2-5 show on their face that they related to a sale of accounts by petitioner's corporation to the bankrupt. It thus appears from the face of the indictment that the questions asked petitioner and his answers related to "the acts, conduct, or property of a bankrupt". Section 21(a) of the Bankruptcy Act, 11 U.S.C. 44(a) (*supra*, p. 2). In a proceeding under that provision (in which this petitioner was examined), a witness may be asked such questions

[5] *Meer* v. *United States*, 235 F. 2d 65 (C.A. 10); *United States* v. *Margolis*, 138 F. 2d 1002 (C.A. 3).

as will disclose the extent of the bankrupt's assets, where they could be recovered, and full information as to the bankrupt's property. See *Marx* v. *Chase National Bank*, 117 F. 2d 800, 801 (C.A. 2); *In re Yourovcta Home & Foreign Trade Co.*, 288 Fed. 507, 513 (C.A. 2); *Ulmer* v. *United States*, 219 Fed. 641 (C.A. 6), certiorari denied, 238 U.S. 638. It was manifestly material to the bankruptcy proceeding to discover how an asset of the bankrupt corporation, purportedly of some size, had been obtained.

2. Petitioner contends that during the examination of the government witness Davis, the bankruptcy trustee, the trial court invaded the province of the jury by implying that, without calling other witnesses who had made unsuccessful attempts to collect Midstate's accounts receivable, the testimony by the trustee that he collected nothing on these accounts was enough to show worthlessness of the accounts (Pet. 2, 8). The incidents involved are set forth on pp. 5-7 of the Statement, *supra*.

The comments by the court were not improper. The court, within its province as governor of the trial,[6] was indicating to the prosecutor that it thought he would be going into unnecessary matters by trying to introduce the bankruptcy file, in view of the fact that no money had been collected. The suggestion that it was not necessary to call additional witnesses merely kept cumulative evidence from being introduced. If petitioner seriously thought there was an improper invasion of the province of the jury by reason of the court's comments, he could have moved for a mistrial

[6] See *Quercia* v. *United States*, 289 U.S. 466, 469; *Glasser* v. *United States*, 315 U.S. 60, 82, 83.

or asked for a curative instruction. The court itself, in its final instructions, made clear that it did not intend to express any opinion on the facts of the case, and that the jury should not infer from the court's comments and questions addressed to witnesses that it was indicating any opinion as to the evidence, or what the jury's findings should be (App. 61a-62a). The argument here is an attempt to magnify passing comments out of all proportion in their setting.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

PETITIONER'S PETITION FOR REHEARING
AND MOTION TO SUPPLEMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 871

HARRY HAROLD CHERETON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONER'S PETITION FOR REHEARING

Petitioner herein, HARRY HAROLD CHERETON, files this his Petition for Rehearing of the Order denying the instant Petition for Certiorari, on the following grounds:

1. It sufficiently appears that Petitioner was indicted for mail fraud and, on additional counts, indicted for a false oath in connection with a bankruptcy.

From the Appendix to Petition and the Opinion of the Circuit Court, it sufficiently appears that after the mail fraud indictment was dismissed, the only evidence relied upon by the Government is evidence supporting the scheme to defraud. This appears from the footnote in the Opinion which sets out the question and answers. Preliminarily, the question was:

> "What was the *BACKGROUND* leading up to this sale of accounts by your company to the bankrupt?"

The answer or contradiction of Kaufman was in answer to this question by Mr. Owen, the prosecutor:

> "Mr. Kaufman, . . . tell the court . . . the nature of this scheme . . . "

And then Kaufman's answers were, in effect, that in Kaufman's opinion it was a scheme to steal.

Apart from the fact that the question, posed called for an opinion of the witness on which no false oath prosecution can be made to stand, on the basis of the *Margolis* case, 138 F 2d 1002. Apart from that, all of Kaufman's answers contradicting CHERETON, were non sequita. They do not prove that the answer of CHERETON was false. In this connection, let's examine from the footnote to the Sixth Circuit Court's Opinion, the whole of CHERETON's answer and the whole of KAUFMAN's reply:

> "Question: What was the *background* leading up to this sale of accounts by your company to the bankrupt?
>
> "Answer: The only way I can answer that is this: Kaufman knew our business, he knew we were creating a large volume of sales through the direct installment sales business and he has been trying to get into this kind of business for I would say many years: in fact, back three or four or five years ago he wanted to learn this business and he even went to work for one of our branches for a period of three or four months to get some background information of this business. It was back four or five years ago—I am unfamiliar with the date—and he was always asking me for information how to get in this business. It is hard to start your business; the only way you can do is by starting from—making a running start. And we met on numerous occasions, I would say dozens and dozens of times, and he would talk to me, I would talk to him, and out of these conversations the idea was developed that he would buy these receivables."
>
> "In violation of Section 152, Title 18 U.S.C."
>
> "(56) Q. (By Mr. Owen, continuing): Mr. Kaufman, will you please tell the Court and jury, in your own words, in simple language, what was the NATURE OF THIS SCHEME and how you were going to effect it, and how you were going to profit from it, and how (57) you were going to conceal your operation, how you were going to avoid detection, if you can?
>
> "A. It started out first by incorporating the business. He advised me to incorporate; that I wouldn't

be personally liable. Then he proceeded to have a note drawn and made out to the corporation.

"Q. Is this the note which you identified as Exhibit No. 8?

"A. That is correct.

"Q. Go on.

"A. And a contract for the sale of the accounts receivable, and how to show an inflated net worth.

"From there, he advised me on what type of merchandise to buy, because he needed a certain type of merchandise in his operation, that I was to send him.

"He sent a man along with me on several buying trips to advise me as to what type of merchandise to buy, and who to buy it from, and in what amounts to purchase that I would be able to obtain from these people.

"First he would advise me to buy a small amount and to receive the merchandise and then to pay promptly, and then the second time is to always enlarge or double the order, which the creditors wouldn't pay any attention to, in order to keep them from wanting their money, so to speak—in other words, to keep them off our backs, so to speak.

"(58) Q. Did you find these suggestions and this advice effective?

"A. Yes, I did.

"Q. Did it work?

"A. Yes, it did.

"Q. Tell the Court and jury why Mr. Chereton went to such great pains and details to acquaint you with an operation of a business with which you were unfamiliar?

"A. Primarily, we had no idea of ever running the Consolidated Radio and Appliance as a business of this type. It was strictly an idea to obtain merchandise to be transferred to the Mid-States Equipment Company, where he would dispose of it through his company and return fifty cents on the dollar to me personally, and eventually let the Consolidated go into bankruptcy and wipe the whole thing out.

"Q. This was a scheme to steal, wasn't it?

"A. That is correct. To defraud the creditors.

"Q. You knew that was what it was when you entered into it?

"A. That is correct.
"Q. And you say Mr. Chereton knew of this, too?
"A. He advised me as to every detail.
"Q. Whose idea was it?
"A. Mr. Chereton's.
"Q. How did Mr. Chereton profit from this scheme?
"A: The *merchandise was shipped to his company.* He—
"Q. (Interposing): Merchandise was shipped to his company from (59) whom?
"A. From Consolidated.
"Q. That was your company?
"A. That is correct. And he disposed of the merchandise. He gave me the offices and places to ship the merchandise. He had offices throughout the country—various parts of the country—and I would ship the merchandise at his direction in what amounts he wanted to each of his offices."

It is incredible to believe that if the accounts were completely worthless Kaufman would agree to pay one-half of merchandise equivalent to $47,000 for something that he contends was worthless. But apart from the incredibility of Kaufman, there is a complete non sequita in his answers.

The instant decision from which certiorari is sought is clearly in conflict with the following Circuit Court opinions which have never been set aside:

NO PERJURY IN EXPRESSION OF OPINION

From *United States* v. *Margolis*, 138 F 2d 1002:

"7. PERJURY, Key 11(1)
"The expression of an opinion which is irrelevant cannot be subject of perjury.

"8. BANKRUPTCY, Key 486.
"Conviction of making false oath in bankruptcy proceeding could not be supported where conviction was based on defendant's answer to question as to whom machinery repossessed by him belonged, and it appeared that the question and answer were not pertinent to the inquiry. Bankr. Act Sec. 29, sub. b(2), 11 U.S.C.A. Sec. 52, sub. b(2)."

ESSENTIAL FACTS THEMSELVES MUST APPEAR IN INDICTMENT

From *Meer* v. *United States*, 235 F 2d 65; at page 67:

"(4) Since Count Three did not charge that the alleged false statement was material to the inquiry, we are of the opinion that it failed to alleged an essential element of the offense and that the motion to dismiss should have been sustained."

At page 65:

"3. INDICTMENT AND INFORMATION, Key 110(3)
"It is not sufficient to charge an offense in words of applicable statute, unless words themselves fully, directly and expressly, and without uncertainty or ambiguity, set forth all essential elements constituting the offense. 18 U.S.C.A. Sec. 152."

THE TEST OF SUFFICIENCY OF AN INDICTMENT IS THAT IT IS NECESSARY THAT SUFFICIENT FACTS BE ALLEGED TO INFORM THE DEFENDANT AND TO SHOW WITH ACCURACY TO WHAT EXTENT HE MAY PLEAD A FORMER ACQUITTAL OR CONVICTION

From *Rud*[illegible] v. *United States*, 254 F 2d 45, at p. 46:

"4. INDICTMENT AND INFORMATION, Key 71.
"'Test of sufficiency of indictment is that it must sufficiently apprise defendant of what he must be prepared to meet and in case any other proceedings are taken against him for a similar offense, that record show with accuracy to what extent he may plead former acquittal or conviction.'"

At page 48:

"(3-5) It is, of course, settled law that in order for an indictment to be valid it must allege all of the elements which are necessary to constitute a violation of the statute. But it is not necessary that the indictment follow the exact wording of the statute. Dunbar v. United States, 156 U.S. 185, 190, 15 S. Ct. 325, 39 L. Ed. 390; United States v. Marcus, 3 Cir., 166 F. 2d 497, 501. The test of the sufficiency of an indictment is that it

> must sufficiently apprise the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, that the record show with accuracy to what extent he may plead a former acquittal or conviction. Hagner v. United States, 285 U.S. 427, 431 . . . "

Under the clear mandate of the *Margolis* case, the question posed to CHERETON, calling for the background, even if the court feels that they are not his opinion, is no more than calling for the "events" leading up to the incident. There is nothing in CHERETON's answer that is contradicted in any way by Kaufman. Even assuming that Kaufman's answers were true they merely go a step further, but do not prove any falsity of CHERETON's answers which were complete as given. Presumably the Circuit Court set out in the footnote the strongest questions and answers it relied upon. There is further, as pointed out in the Petition for Rehearing, a clear conflict with *Meer*, where the Circuit Court says, p. 5:

> "We would hesitate to hold that an indictment in the exact words of a valid criminal statute was insufficient because it did not contain an element of the offense engrafted thereon by judicial decision. In such a case as the present one, it should be sufficient if the evidence disclosed that the question propounded related to a material matter. To us the point seems highly technical because even though materiality was not expressly alleged in the indictment, it clearly appeared from the questions and answers set forth therein that they were material to the inquiry in the bankruptcy proceeding. This is all that the decision in Meer required."

Inference: Even though the Circuit Court would hesitate to hold it, such an inference clearly contradicts with *Meer* v. *United States*, 235 F 2d 65.

It is unthinkable, and a severe miscarriage of justice to predicate a criminal conviction and a lengthy prison sentence on CHERETON's conscientious, correct and truthful an-

swer to a vague opinion-seeking question posed and based on anything as vague as "background." Similarly, Kaufman's response to this question was a matter of opinion.

> "Q. This was a scheme to steal, wasn't it?
> "A. That is correct."

This type of opinion evidence is severely condemned, not only by *Margolis*, but by a recent annotation in 66 ALR 2d 796, 800; where the annotator cites numerous cases that the opinion must not be elicited.

> "Appellee should not have been asked whether unlawful sales were made. The fact as to whether there had been sales might have been elicited from the testimony . . . The result of such negotiations is a question of law . . . therefore, a matter of opinion."

Citing also, *U. S.* v. *Smith* (1870), 66 ALR 2d 800:

> "a party cannot be convicted of perjury when the falsity of the oath is not attributable to a corrupt intention but to an error of judgment or a mistake as to the law or facts."

The above cited colloquy clearly shows immaterial, irrelevant conclusions of law, conclusions of the witness, and the question as posed calls for the opinion of the witness.

One could define "background" as the scene and also the "sum" of one's experience, training, education, etc. Could it be said that in answer to a question about background, if the witness left out some of his education, that perjury could be predicated of it? It is difficult to see how a conclusion of law, or conclusion of a witness could more be called for or evoked than by the posing of the question of background. False swearing implies a corrupt intent.

Even if the court should construe "background" as amounting to asking, "What are the facts leading up to this sale?" Kaufman's answers, although at variance with Chereton's and although they have engrafted on them a heinous and criminal scheme to defraud, which the trial

court directed a verdict against, taking it away from the jury, removing it from its consideration and thus holding it non-existent, it is difficult for the petitioners to understand how they could be convicted of lying about something that the court thought so little of that it dismissed it from the jury's consideration. By this directed verdict for mail fraud, the court effectually found that there was no conspiracy to steal. How then can false swearing be predicated of CHERETON's failure to give the answer the District Attorney wanted him to give: that this was a conspiracy to steal.

Even "Words and Phrases" legally defines perjury as:

> "wilful false swearing to a substantially definite and material *fact.*"

Unquestionably, the instant Circuit Court decision, certiorari of which is sought, conflicts with this holding of *Margolis* v. *U. S.*, 138 F 2d 1002, 1005:

> "IT IS AXIOMATIC THAT THE EXPRESSION OF AN OPINION WHICH IS IRRELEVANT CANNOT BE THE SUBJECT OF PERJURY."

There further has been completely overlooked the conflict with the two-witness rule requiring the testimony of two witnesses, both as to falsity and knowing falsity for any conviction of false oath or perjury.

See *Young* v. *U. S.*, 212 F 2d; *May* v. *U. S.*, 280 F 2d 555; and *Weiler* v. *U. S.*, 65 S. Ct. 548, holding:

> "SINCE EQUALLY HONEST WITNESSES MAY WELL HAVE DIFFERING RECOLLECTIONS OF THE SAME EVENT . . . A CONVICTION FOR PERJURY OUGHT NOT TO REST UPON THE OATH OF ONE."

And, we might add, particularly not in the instant case, where the one witness was a convicted co-conspirator.

In the instant case the proof fails utterly to show that the defendant knew that his answers were not true. For

the clear conflict here with *Meer* v. *U. S.*, 235 F 2d 65, holding that facts showing materiality is indispensable; for the clear conflict with *Rudin* v. *United States*, 254 F 2d 45, holding that the indictment must allege the necessary ingredients; and for the clear conflict with *United States* v. *Margolis*, 138 F 2d 1002, holding that no conviction may be had for an opinion or conclusion of law, and for the further holding that the comments of the court invading the province of the jury were corrected by the general instruction of the court, we respectfully pray that a re-hearing may be granted, so the injustice and the severe miscarriage of justice herein set out may be demonstrated.

MOTION NUNC PRO TUNC

The Petitioner herein moves for a order for extension of time so that the original Petition for Certiorari be considered as timely filed in view of the fact that any delay of filing the original Petition for Certiorari was caused by the error of the Clerk of the Circuit Court mailing the record directly to Fred R. Walker, Attorney for Petitioner, to Detroit, Michigan, instead of mailing same direct to the Clerk of the Supreme Court in Washington, D. C.

WHEREFORE, your Petitioner prays for an order nunc pro tunc that said original Petition for Certiorari be taken and considered as timely filed.

CONCLUSION

In view of the importance of the questions involved to the bench and bar, the conflict of the instant decision with the unreversed decisions of other Circuits, and with the impairment of the Petitioner's constitutional right, it is respectfully requested that this petition be granted and that, pending a hearing, this Honorable Court, or a Justice thereof, will order the mandate herein recalled and notifica-

tion thereof to be withheld, as required under Rule 25 of The Supreme Court Rules.

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Certificate of Counsel

The undersigned, Montague Rosenberg, attorney for petitioner herein, hereby certifies that the Petition for Rehearing herein is presented in good faith and not for delay, and that in his judgment said petition is restricted to grounds permitted by Rule 58 of this Court.

MONTAGUE ROSENBERG
Attorney for Petitioner